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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-346

No. ~~1893~~

GEO. A. CLARK & SON, INC., a corporation,
Petitioner,

vs.

F. W. NOLD and HELEN A. NOLD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

MICHAEL LANGDON CULHANE
1015-16-17 Soo Line Building
Minneapolis, Minnesota 55402
Attorney for Petitioner

CULHANE & CULHANE
1015-16-17 Soo Line Building
Minneapolis, Minnesota 55402
MALONEY, KOLKER & KOLKER
Berkshire Plaza Building
Aberdeen, South Dakota
Of Counsel for Petitioner

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F. W. NOLD and HELEN A. NOLD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Geo. A. Clark & Son, Inc., a corporation, by Michael Langdon Culhane, its attorney, petitions for a writ of certiorari to review the final decree of the Supreme Court of the State of South Dakota, entered in this case on April 13, 1971, affirming a judgment of the lower court (Circuit Court of the Fourth Judicial Circuit of State of South Dakota) entered March 3, 1970.

OPINIONS BELOW

(The involved procedural history below requires specification in some detail). The findings, conclusions and order for judgment and judgment of the lower court are appended (App. 25). In that connection, also appended are the Memorandum decision of the lower court (App. 23), the prior Memorandum of the lower court therein referred to pertaining to motion for summary judgment by plaintiff and

application to intervene (App. 17), and the Opinion and Order of the Referee for the United States District Court for the Western District of Wisconsin (App. 13). The final decree of the Supreme Court of South Dakota entered April 13, 1971 is also appended (App. 32). It is reported in 185 N.W.2d 677.

JURISDICTION

The final decree of the Supreme Court of South Dakota was entered April 13, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

The questions presented in this case are:

(1) Whether a purchaser of real estate from the trustee in bankruptcy, said sale being without notice to a statutory lienholder, where the terms of the sale are subject to lien, can assert in a subsequent state court proceeding the defense of 11 U.S.C. 107(a)(1) (Sec. 67(f) of the Bankruptcy Act) and void the lien?

(2) Whether the trustee in bankruptcy is the only one who can assert the defense of 107(a)(1), 67(f) under these circumstances?

(3) Whether the purchaser under these circumstances with actual knowledge of the attachment lien of petitioner is one "claiming under the trustee," as defined by this Court in the case of *Fischel v. Pauline Oil & Gas Co.*, 309 U.S. 294, so that purchaser may assert the defense of 107(a)(1), 67(f) without regard to creditors?

STATUTE INVOLVED

Section 67(f) of the Bankruptcy Act of 1898 (11 U.S.C. 107(a)(1)) provides in part:

> "Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this title, by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent. . . ."

STATEMENT[1]

The action grows out of sales of merchandise by Geo. A. Clark & Son, Inc., to one Stanley Vetos of Madison, South Dakota, prior to May of 1967 and for which he owed Clark. Vetos lived in Madison, South Dakota. He moved from South Dakota and became a resident of Wisconsin. However, he was a record owner of real estate in South Dakota, in the City of Madison, South Dakota, described as:

> Lots Nineteen (19) and Twenty (20) in Block One (1) of Town Proprietor's Second Addition to the City of Madison, Lake County, South Dakota.

Geo. A. Clark & Son, Inc., petitioner, hereinafter referred to as Clark, commenced an attachment proceeding in South Dakota against Vetos on or about May 4, 1967, against the real estate above-described and perfected service.

On June 8, 1967, Vetos filed voluntary bankruptcy in the United States District Court for the District of Wisconsin

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[1]The facts as recited are a summary of the undisputed factual situation as set forth in the Memoranda of the Circuit Court of South Dakota, the Order of the Referee in Bankruptcy, the Findings of Fact, Conclusions of Law and Judgment of the Circuit Court, and the final decree of the Supreme Court of South Dakota. The statement is quite detailed as the procedural history of the case is quite detailed. It contains within it, information as to when and how the federal questions sought to be reviewed, were raised and how they were passed on by the court.

and was adjudicated bankrupt. Subsequently, the trustee filed his final account, and that account was approved by the Referee, and the Vetos bankruptcy estate has been closed.

In his schedules in bankruptcy, Vetos listed the attachment proceeding of Clark in the real estate above named. Vetos did not claim the real estate to be homestead or in any other way exempt. Neither Vetos nor the trustee of his estate took any action to restrain the attachment proceedings of Clark.

F. W. Nold and Helen A. Nold, respondents (hereinafter referred to as respondents), negotiated for the purchase of the interest of the trustee in the bankrupt's real estate in Madison, South Dakota, above referred to, which was subject to the attachment lien of Clark (petitioner).

On July 26, 1967, the trustee applied to the Referee for an Order authorizing the trustee to sell the real estate at private sale to the respondents for $17,250.00 (less than the appraised value). The Referee issued an Order setting a hearing on the proposed sale. Clark was not given notice of the hearing. A hearing was held and the sale confirmed without notice to Clark of the hearing.

The respondents, with actual notice of the attachment proceeding, took no action to restrain the attachment proceedings.

Clark never consented to nor was ever within the jurisdiction of the bankruptcy court. It never filed a claim in that proceeding.

The sale was confirmed on August 18, 1967. On February 27, 1968, the Circuit Court of Lake County, South Dakota, entered Findings of Fact and Conclusions of Law and Judgment in favor of Clark against Vetos in the amount of $6,758.39, thereby perfecting its attachment lien. On June 12, 1968, the instant action was commenced by Clark against

respondents for the purpose of determining the relative interests and priorities of Clark and the respondents in the real property. In its complaint, Clark recited the procedural history and the obtaining of the judgment against Vetos perfecting the attachment lien.

The respondents in their answer claimed that the sale was with notice and that the terms of the sale were free and clear of liens and asserted the defense of Sec. 107(a)(1) (67(f) of the Bankruptcy Act) as being a lien obtained within four months of bankruptcy at a time when Vetos, the bankrupt, was insolvent, and therefore the lien was voided.

On October 4, 1968, Clark moved the lower court for summary judgment, asserting that the defense of 107(a)(1) was not one assertable by the respondents. Before the hearing on the motion, the trustee obtained an Order to Show Cause to Clark before the Referee in the State of Wisconsin why the Clark lien should not be declared void. Clark filed objections to the bankruptcy court's jurisdiction. Its objections were sustained by the Referee. In the course of his Memorandum Opinion, the Referee pointed out that none of the application papers before him had asked that the sale be free and clear of liens; that, therefore, under applicable law, the sale was subject to the lien of Clark.

Thereafter, Lawrence W. Rice, the trustee, moved the South Dakota Court for leave to intervene in the pending litigation, but in his moving papers did not indicate in which capacity he was moving, i.e., as trustee or individually. His application to intervene was denied by the lower court in South Dakota. The Court stated that since the trustee had sold the property, the trustee no longer had any interest in the property, and, therefore, could not intervene.

The lower court in the course of its Memorandum, also denied Clark's Motion for Summary Judgment. In so hold-

ing, the lower court relied on *Fischer v. Pauline Oil & Gas Co.*, 309 U.S. 294.

The case came on for trial before the Circuit Court. In his Memorandum Opinion, handed down January 19, 1970, the Court held that the property was sold free and clear of liens and that the respondents could assert as a defense the provisions of Sec. 107(a)(1).

The Findings of Fact, Conclusions of Law and Judgment, prepared by respondents at the request of the Court, were adopted by the Court and follow the Memorandum Decision. Clark instituted timely motions for substituted Findings of Fact, Conclusions of Law and Order for Judgment and Motion for New Trial, assigning as error therein, among others, the Court's error in permitting any evidence of insolvency since the defense of 107(a)(1) was not a defense which could be raised by the purchasers (Nolds). The Court denied the motions of Clark. A timely appeal was filed to the South Dakota Supreme Court. While appeal was pending, the lower court reinstated the lien for purpose of the appeal and the lien has been and is so reinstated pending this application for Writ of Certiorari since the South Dakota Supreme Court has entered a Stay Order, pending a ruling on this application.

In the Supreme Court of South Dakota, and pursuant to some 19 assignments of error, the statement of questions presented to the Supreme Court included whether the property was sold free and clear of liens, and whether the purchasers were parties who could void the lien under Sec. 107(a)(1).

On appeal, respondents abandoned their claim that the

sale was free and clear of liens[2], taking the position that the terms of sale were of no importance.

The South Dakota Supreme Court in affirming the lower court's judgment (Majority Opinion) held that basic to its problem was the provision of 11 U.S.C. Sec. 107(a)(1), and held that the purchaser has standing to seek avoidance of liens falling within the prescription of Sec. 107, "He is a party claiming under the trustee."

The dissenting opinion stated that it could not agree that respondents as purchasers at a bankruptcy sale have standing to avoid appellant's lien under the provision of Sec. 107.[3]

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[2]Petitioner had pointed out that the Referee's order determined that the trustee's deed to respondents was incorrect in stating that the sale of the property was free of liens, that none of the court papers relating to the sale of the property have any reference to sale of the property free of liens. Also, the Referee said, "the trustee did not have power to sell the property free of liens because the order of this court did not direct that the sale be made in this manner . . . and that whatever the recitals in the trustee's deed, it seems that an order of sale making no mention of liens will be considered as a sale subject to existing liens. 4A Collier on Bankruptcy, Sections 70.97(2) and 70.99(2) at pgs. 1132 and 1216." The lower court's error stemmed from an incorrect application of law or failure to apply bankruptcy law. That is, that the Federal Bankruptcy Court is the one and only forum which can and must set forth the terms of the sale. The South Dakota Court had held that because the deed contained the word "grant", that under South Dakota statute, this meant free and clear.

[3]For an extended discussion of the majority and minority opinions in the South Dakota State Supreme Court, see the section on REASONS FOR GRANTING THE WRIT. Petitioner has wished to avoid duplication and preferred to discuss the decisions under the REASONS.

REASONS FOR GRANTING THE WRIT

This case, concerning as it does, a question of the interpretation of a federal statute in bankruptcy (11 U.S.C. 107 (a)(1), 67(f), Bankruptcy Act)[4] is of utmost importance to referees, trustees, and all attorneys practicing in bankruptcy. There has been not only conflict between the courts, but conflict in the court from which this appeal has been taken, as is shown by the majority and minority decisions in the South Dakota Supreme Court appended to this petition. Furthermore, there would appear to be a matter of federal substance not yet passed on by this Court. Also, there is the question of the meaning of this Court's decision in *Fischer v. Pauline Oil & Gas Co.*, 309 U.S. 294.

The bankruptcy statute involved has been interpreted as meaning voidable, not void. The question to be resolved is who can void the lien and in what circumstances? There must be borne in mind always that the purpose of the Bankruptcy Act is to benefit and protect creditors.

The respondents have claimed that the trustee or anyone claiming under him could void the lien, and that they are claiming under the trustee. The petitioner has claimed consistently that in the case of a sale under the bankruptcy statute of encumbered property only the trustee could void

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[4]The statute involved has been earlier set forth in the section, STATUTE INVOLVED, but may be here set forth again for the Court's convenience:

> "Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this title by or against such person, shall be deemed null and void (a) if at the time when such lien was obtained, such person was insolvent. . . ."

the lien.[5] The lower trial court held the property was sold free and clear of liens, but the respondents in their brief on appeal to the South Dakota Supreme Court said that they were no longer arguing this. The South Dakota Supreme Court noted, also, that this argument seemed to have been abandoned. At the same time, the Court relied for their decision on the cases cited by the respondents, in none of which cases was the property sold encumbered by lien (*Finney v. Knapp Co.*, 145 Ga. 400, 89 S.E. 413; *Fischer v. Pauline Oil & Gas Co.*, 309 U.S. 294; and *Branch v. Human*, 215 Ga. 209, 109 S.E.2d 732). The petitioner had pointed out that in *Kruger v. Harber Realty Corp.*, 11 N.J. Super. 552, 78 A.2d 621, the Court refused to permit the invalidation of a lien under 67(f) of the Bankruptcy Statute (11 U.S.C. 107(a)) at the instance of one claiming under a sale by the trustee of the property of the bankrupt, subject to any and all encumbrances whatsoever. Petitioner had cited, also, to the effect that the lien can be invalidated only by the trustee, such cases as *Grimbalis v. Linfair, Inc.*, 126 N.J.L. 82, 18 A.2d 412; *Kobrin v. Drazin*, 97 N.J. Eq. 400, 128 Atl. 796; and *In re Graves' Estate*, 27 F. Supp. 717, 41 A.B.R. (N.S.) 371 (1939 D.C. Ky.). It was part of the opinion of the dissent in the South Dakota Supreme Court that "the authorities cited in the *majority* opinion seem . . . to compel the

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[5]The South Dakota Supreme Court has remarked to the effect that the attempt of the trustee to be permitted to intervene in the action and seek avoidance of the attachment lien on the grounds that it was void under Sec. 107 as resisted by appellant, is inconsistent with its present position. But the lower court in South Dakota, quite correctly pointed out that in this case, the trustee sold the property and conveyed his interest therein to the defendants, Nolds. "Since the trustee no longer has any interest in the property, he cannot intervene. The interest which entitles a party to intervene must be a direct interest by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties. Smith v. Gale, 144 U.S. 509."

conclusion that only the trustee in bankruptcy may assert invalidity of liens under the provisions of Sec. 107."

An essential part of petitioner's argument, and also the argument of the dissenting judge in the South Dakota Supreme Court, is that the primary purpose of the Bankruptcy Act is to protect creditors. In *Morris Plan Bank of Georgia v. Simmons*, 201 Ga. 157, 39 S.E.2d 166 (which overrules in effect the case of *Finney v. Knapp Co.*, supra, cited at great length by the respondents), cited by the dissenting judge in the South Dakota Supreme Court, it is said specifically:

> "* * * The petition * * * seeking to set aside the default judgment against themselves as garnishees, does not purport to serve any purpose recognized by the Bankruptcy Act, and the plaintiffs do not show any right to invoke its provisions. They are debtors rather than creditors of the bankrupt, and would therefore have no interest whatever in avoiding the lien for the benefit of such creditors."

The South Dakota dissenting judge in this regard said also to this effect, "see *Branch v. Human*, supra", which actually is another of the cases cited by the respondents.[6]

The South Dakota Supreme Court (Majority Decision) has relied heavily on a decision of this Court, *Fischer v. Pauline*, supra, as to rights of those "claiming under the trustee" to void the lien. But as the dissent in the South Dakota Court held: "The Fischer case declared that the predecessor of Sec. 107 was not self-executing, it did not

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[6]The South Dakota Supreme Court, also, has maintained that the cases cited by petitioner are distinguishable because none of them involve a purchaser for property for value from the trustee. But in this case, the respondents are not purchasers of property for value from the trustee because they bought it subject to appellant's lien. They are not purchasers of value as to the lien. The South Dakota Supreme Court brushed aside the fact that the sale was by Order of the Referee subject to the attachment lien, and that the purchase price was less than the appraised value.

hold that a purchaser at a bankruptcy sale is entitled to invalidate a lien for his own benefit. . . ." And again: "Respondents saw fit to purchase the property in question at a time when they were on notice of appellant's attachment lien. I cannot believe that the purpose of Sec. 107 is to give strangers to the bankrupt and his creditors the right to invalidate an otherwise valid lien when neither the trustee nor any creditor has seen fit to take such action."

In the case at issue as decided there would be no benefit to creditors. The respondents are not general creditors of the bankruptcy estate. If the benefit is then taken away from the petitioner, the petitioner has lost something, respondents have got something for nothing, and general creditors have got nothing. In other words, the respondents in this case, as the dissent in the Supreme Court of South Dakota held, tried to make use of the bankruptcy statute for their benefit only.

It would appear, then, from all the foregoing that there is indeed conflict between the courts, and conflict in the Supreme Court of South Dakota itself, as to the questions presented, that a federal question of substance as to whether a purchaser from the trustee in bankruptcy with notice and under a sale subject to the lien can assert, 11 U.S.C. Sec. 107 (67(f) of the Bankruptcy Statute), for his own benefit and set aside the lien, has not yet been passed on by this Court, and its resolution and the Court's meaning in the *Fischer* case are at issue.

The South Dakota Court's decision, if allowed to stand, upsets the validity of bankruptcy sales. While no attack is made upon the sale (subject to lien) the effect of the South Dakota decision is to go around the bankruptcy sale and set aside the lien in a state court proceeding for the benefit of the purchaser. If this is allowed to stand, the fate of lien

creditors can be decided in State Court proceedings by simply sales without notice by trustee, confirmation of such sales without notice, and leaving the fate of lien creditors to the opinion of local State Court judges free of restraint of bankruptcy principles.

A decision by this Court is necessary to determine this important federal question of bankruptcy law, and the federal statute so that the meaning and validity of bankruptcy sales cannot be put in question by State Court proceedings and the complete rights of all parties be protected under law. The decision of the South Dakota Supreme Court, if it is erroneous, as claimed by petitioner, and not set aright by this Court, will perpetuate discord among the Courts. The problem presented should be resolved now by this Court to avoid such discord.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL LANGDON CULHANE
1015-16-17 Soo Line Building
Minneapolis, Minnesota 55402
Attorney for Petitioner

CULHANE & CULHANE
1015-16-17 Soo Line Building
Minneapolis, Minnesota 55402
MALONEY, KOLKER & KOLKER
Berkshire Plaza Building
Aberdeen, South Dakota
Of Counsel for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

In Bankruptcy No. 67-BK-394

In the Matter of: STANLEY ORVILLE VETOS, Bankrupt.

OPINION AND ORDER

Dated at Madison, in said district, this 23rd day of January, 1969.

The court, on the petition of the trustee, ordered Geo. A. Clark & Son, Inc., to show cause why its lien against real property owned by the bankrupt in South Dakota should not be declared null and void. The trustee's petition stated that the petition in bankruptcy in this matter was filed on June 8, 1967, that Geo. A. Clark & Son, Inc., at times when the bankrupt was insolvent, attached the property on May 4, 1967, filed a notice of levy in the office of the Register of Deeds, Lake County, South Dakota, on May 8, 1967, and obtained a judgment against the bankrupt in the sum of $6,758.39 on February 27, 1968.

Geo. A. Clark & Son, Inc., filed a motion objecting to the jurisdiction of this court. The matter was heard and briefs were filed. I have concluded that the objection to the jurisdiction of this court is sound and that it must be sustained.

This controversy was caused by two unfortunate circumstances: (1) the failure of the bankrupt to list Geo. A. Clark

& Son, Inc., as a creditor in his original schedules and (2) the attempt of the trustee to sell the real property mentioned free of liens without an order from this court authorizing him to make the sale in that manner.

Although the bankrupt's statement of affairs stated that an action commenced by Geo. A. Clark & Son, Inc., against the bankrupt for $6,736.86 was pending in the Circuit Court for Lake County, South Dakota, and that the real estate had been attached, the bankrupt's schedules did not list Geo. A. Clark & Son, Inc., as a creditor. Consequently, the court did not include Geo. A. Clark & Son, Inc., among the creditors given notice of the first meeting. Realizing thereafter that he had omitted to list Geo. A. Clark & Son, Inc., as a creditor, the bankrupt, on September 1, 1967, petitioned the court for leave to amend his schedules. The court entered an order granting a petition on that date and mailed to Geo. A. Clark & Son, Inc., a notice of this bankruptcy proceedings. However, as will soon appear, both the court's order granting the amendment and its notice followed the date of the sale of the real property.

The first step in the sale of the real property was the trustee's application, July 26, 1967, for an order authorizing him to sell the property at private sale to F. W. Nold and Helen A. Nold for $17,250. Accordingly, the court ordered that a hearing on the trustee's application be held on August 18, 1967, and gave notice to creditors. Since there were no objections to the proposed sale and it appeared that the offer of the Nolds was reasonable, the court entered an order that day authorizing the trustee to consummate the sale. None of these papers—the application of the trustee, the order for hearing, the notice to creditors, the order for private sale—stated that the property would be sold free of liens.

In support of his petition, the trustee filed an affidavit and

copies of two instruments relating to the real property. One is a Contract for Deed, dated July 19, 1967, in which the bankrupt and his wife agreed to convey the property to the Nolds by warranty deed free of all incumbrances for $17,250. The other instrument filed by the trustee is his deed to the Nolds, dated September 8, 1967, which after stating that the court ordered the sale of the property free of liens, conveyed the property to the Nolds free of liens for $17,250. The affidavit of the trustee also states that, pursuant to the order of this court, the trustee sold the property to the Nolds free of liens.

Those statements are incorrect. As already pointed out, none of the court papers relating to the sale of the property, beginning with the trustee's application for authority to sell and ending with the order for private sale, have any reference to sale of the property free of liens.

The trustee's affidavit also states that Geo. A. Clark & Son, Inc., entered a judgment against the bankrupt on February 27, 1968, in the Circuit Court for Lake County, South Dakota, for the sum of $6,758.39.

The trustee delivered the deed to the Nolds, paid Madison Building & Loan Association, Madison, South Dakota, a mortgagee, the sum of $14,619.14, and deposited the balance of $1,519.56, which remained after the expenses of the sale, as an asset of the estate.

It is well settled that the bankruptcy court may order the sale of assets free of liens and that it has jurisdiction over the parties asserting liens against the property for the purpose of determining whether the liens are valid, entitling their holders to payment out of the proceeds of the sale. 6 *Remington on Bankruptcy* Section 2577. Consequently, if the trustee sold the real estate free of liens, this court has jurisdiction to hear the trustee's petition and to determine

whether the estate or the creditor is entitled to the sum of $1,519.56 remaining from the sale of the property.

However, the trustee did not have the power to sell the property free of liens because the order of this court did not direct that the sale be made in this manner. 9 *Am. Jur. 2d Bankruptcy* Section 1233. The act of the trustee in excess of his powers cannot give the court jurisdiction. Geo. A. Clark & Son, Inc., has not claimed the $1,519.56 remaining from the sale of the property. Had it applied for payment of the remaining proceeds from the sale, it would have submitted to the jurisdiction of this court. Instead, Geo. A. Clark & Son, Inc., has refrained from appearing in this case and has objected to the court's jurisdiction.

The instant case is similar in many respects to *In Re Platteville Foundry & Machine Co.*, 147 F. 828 (D.C. W.D. 1906), where the trustee attempted to sell property of the estate free of liens even though the court did not direct such a sale. Likewise, the lien holder in that case did not receive timely notice of the sale, did not appear in the bankruptcy proceedings, and did not petition the court for the payment of the amount of its lien. The court held that it did not have jurisdiction in those circumstances.

Whatever the recitals in the trustee's deed, it seems that an order of sale making no mention of liens will be considered as a sale subject to existing liens. 4A *Collier on Bankruptcy*, Sections 70.97(2), 70.99(2), at pages 1132 and 1216. True, Geo. A. Clark & Son, Inc., obtained its judgment against the bankrupt after the filing of the petition in bankruptcy and its lien would ordinarily not be good against the trustee. *Lockhart v. Garden City Bank & Trust Co.*, 116 F. 2d 658 (2nd Cir. 1940). However, the vulnerability of that judgment alone does not give this court jurisdiction.

The plight of the Nolds is most unfortunate. It appears

that Geo. A. Clark & Son, Inc., has commenced an action against them to enforce its lien. But equitable considerations cannot be considered in the resolution of jurisdictional problems. Moreover, the Nolds have not appeared in this matter.

The objection of Geo. A. Clark & Son, Inc., to the jurisdiction of this court is sustained and, it is

ORDERED that the petition of the trustee be, and it hereby is, dismissed.

Entered this 23rd day of January, 1969.

/s/ LEONARD BESSMAN
Referee in Bankruptcy

STATE OF SOUTH DAKOTA
COUNTY OF LAKE, SS.

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

GEO. A. CLARK & SON, INC., a corporation,
Plaintiff,

vs.

F. W. NOLD and HELEN A. NOLD,
Defendants.

MEMORANDUM OPINION

Dated April 25, 1969

This is an action commenced by Geo. A. Clark & Son, Inc., a corporation, plaintiff, vs. F. W. Nold and Helen A. Nold, defendants, to determine the validity of a Judgment entered by this court in favor of this plaintiff against one Stanley Vetos in the sum of $6,758.39. The issues to be determined by this court are:

1. Should the court grant plaintiff's motion for a summary judgment.

2. Should L. W. Rice be permitted to intervene as a defendant.

From the pleadings, documents and statement of counsel, the following facts appear. One Stanley Vetos owned Lots 19 and 20 in Block 1 of Township Proprietor's Second Addition to the City of Madison, Lake County, South Dakota. On or about May 4, 1967, the plaintiff herein, Geo. A. Clark & Son, Inc., commenced an action against Mr. Vetos, then a non-resident of the State of South Dakota, by attaching the real property. On June 8, 1967, Vetos filed a voluntary bankruptcy petition in the United States District Court for the Western District of Wisconsin and was adjudicated a bankrupt. Vetos' bankrupt's statement of affairs stated that an action had been commenced by plaintiff, Geo. A. Clark & Son, Inc., but his schedules did not list the plaintiff as a creditor. The Referee in Bankruptcy did not include plaintiff among the creditors given notice of the first meeting of creditors.

On July 26, 1967, the Trustee in Bankruptcy, L. W. Rice, applied for an order authorizing him to sell the lots in Madison at private sale to defendants Nold. The Referee ordered a hearing on the Trustee's application to be held on August 18, 1967, and gave notice to creditors. There were no objections to the proposed sale and the Referee entered an order authorizing the Trustee to consummate the sale. None of the proceedings stated the property would be sold free of liens.

On September 1, 1967, the Trustee petitioned the Referee for leave to amend his schedules. The Referee entered an order granting the Petition and mailed to Geo. A. Clark & Son, Inc., a Notice of the bankruptcy proceedings. The Trustee issued his Deed conveying the property to the Nolds

on September 8, 1967, which stated the Referee ordered the sale of the property free of liens.

On or about February 27, 1968, this court entered its Findings of Fact and Conclusions of Law and Judgment in favor of plaintiff against Stanley Vetos. This was a default Judgment entered in the amount of $6,758.39.

The present action was commenced against the Nolds in June of 1968. The Nolds, in answering, have alleged as a defense 11 USCA, Sec. 107, as amended, which provides in part that every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition for bankruptcy shall be deemed null and void if at the time when such lien was obtained such person was insolvent.

The Answer also points out that the Madison Building and Loan Association received $15,770.77 for payment of a mortgage which was a prior lien to plaintiff's Judgment, and the balance of $1,519.56 was retained by the Trustee for distribution to the creditors. It also alleges the plaintiff had knowledge of the bankruptcy proceedings. The property was appraised for the sum of $20,032.00.

After the motion for summary judgment, the Trustee petitioned the Referee for a show cause order requiring the plaintiff, Geo. A. Clark & Son, Inc., to show cause why an order should not be entered by the Referee declaring the Judgment to be null and void. Upon motion, I reserved my decision for summary judgment to see whether the Referee would so rule. Apparently we have concurrent jurisdiction. 11 USCA, Sec. 107, Subsec. d(7)e; Branch vs. Human (Ga.), 109 S.E.2d 732.

Geo. A. Clark & Son, Inc., objected to the jurisdiction of the Referee and on January 23, 1969, the Referee rendered

his opinion and order sustaining its objection. The Trustee, L. W. Rice, then petitioned this court to intervene as a defendant, requesting the court to render the Judgment null and void under the provisions of 11 USCA, Sec. 107, as amended. Plaintiff resists the motion for intervention.

I will first consider the proposition of whether or not the plaintiff's motion for summary judgment should be granted. Our Supreme Court in Anderson vs. Billingsly, 46 S.D. 17, 189 N.W. 986, 25 A.L.R. 96, held the term "null and void" abrogated a garnishment. In the Anderson case, the bankrupt was permitted to assert the provisions of 67f of the Bankruptcy Act (U.S. Comp. St., Sec. 9651), as amended, now 11 USCA, Sec. 107. Most courts have held the provisions of this law are for the benefit of the creditors and trustee, or those claiming under or through the trustee. Fischer vs. Pauline Oil & Gas Co., 309 U.S. 294, 84 L.Ed. 764; Morris Plan Bank of Georgia vs. Simmons (Ga.), 109 S.E.2d 732; United States of America vs. Walton (D.C. N. Dak.), 234 Fed. Supp. 928; 9 Am. Jur.2d, Bankruptcy, Sec. 1042; 8A C.J.S., Bankruptcy, Sec. 245, Subsec. 4(b), page 308.

In Fischer vs. Pauline Oil & Gas Co., supra, the United States Supreme Court stated:

> "A number of state courts have held, and we think rightly, that the section is intended for the benefit of creditors of the bankrupt and, therefore, does not avoid liens as against all the world but only as against the trustee and those claiming under him. It is settled, however, that not only may the trustee avoid the lien (Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 68 L.ed. 770, 44 S.Ct. 396, 2 Am. Bankr. Rep. (N.S.) 912, and Connell v. Walker, 291 U.S. 1, 78 L.ed. 613, 54 S.Ct. 257, 24 Am. Bankr. Rep. (N.S.) 229, supra), but that the bankrupt may assert its invalidity as respects property set apart to him as exempt in the bankruptcy proceeding.

Chicago, B. & Q. R. Co. v. Hall, 229 U.S. 511, 57 L.ed. 1306, 33 S.Ct. 885, 30 Am. Bankr. Rep. 619. But the lien is not avoided for the benefit of the bankrupt save as to his exempt property or nullified as respects other lienors or third parties.

"Although Sec. 67(f) unequivocally declares that the lien shall be deemed null and void, and the property affected by it shall be deemed wholly discharged and released, the section makes it clear that this is so only under specified conditions. At the date of creation of the lien the bankrupt must have been insolvent; the lien must have been acquired within four months of the filing of the petition in bankruptcy; and the property affected must not have been sold to a bona fide purchaser. Furthermore, the lien is preserved if the trustee elects to enforce it for the benefit of the estate. These conditions create issues of fact which, as between the trustee, or one claiming under him, and the lienor, or one claiming by virtue of the lien, the parties are entitled to have determined judicially. The courses open to the trustee under the Bankruptcy Act of 1898 were to proceed to have the lien declared void, by plenary suit, or by intervention in the court where it was obtained, or by applying, in the bankruptcy cause, to restrain enforcement, as might be appropriate in the circumstances."

No cases have been cited, nor have I found any which present a factual situation on all fours with the case at bar. Most of the decisions hold—and I have read many more than I have cited—that a person claiming under or through the trustee may take advantage of 11 USCA, Sec. 107.

Therefore, I am going to hold the Nolds may assert this statute as a defense in the present suit. Consequently, the motion for summary judgment shall be denied. Whether other conditions of the statute are present requires a judicial determination.

The second question is whether the Trustee, Mr. L. W. Rice, should be permitted to intervene in the present action. To entitle a third party to intervene in a pending suit, he

must have an interest in the matter about which the litigation is to be and of such direct and immediate character that intervenor will either gain or lose by the direct operation and effect of the judgment. Jackson vs. Board of County Commissioners, 76 S.D. 495, 81 N.W.2d 686. Also see SDCL 1967, 15-6-24.

In this case, the Trustee sold the property and conveyed his interest therein to defendants Nold. Since the Trustee no longer has any interest in the property, he cannot intervene. The interest which entitled a party to intervene must be a direct interest by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties. Smith vs. Gale (1892), 144 U.S. 509, 36 L.Ed. 521, 12 S.Ct. 674.

Therefore, the Trustee's motion to intervene is denied. Mr. Spencer may prepare an order denying the motion for summary judgment and Mr. Maloney may prepare an order denying the motion to intervene.

I would suggest that counsel try and stipulate as to most of the facts in this case and the admission of the documents into evidence. If you cannot stipulate all of the facts and documents, then we can take evidence upon those matters which cannot be stipulated. Please let me know when you want to try the case.

Yours very truly,

/s/ GEORGE W. WUEST
Circuit Judge

STATE OF SOUTH DAKOTA,
COUNTY OF LAKE, ss.

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

GEO. A. CLARK & SON, INC., a corporation,
Plaintiff,

vs.

F. W. NOLD and HELEN A. NOLD,
Defendants.

MEMORANDUM OPINION

Dated January 19, 1970

On April 25, 1969, this Court rendered its memorandum opinion upon plaintiff's motion for summary judgment, which pointed toward the final decision herein. I have very carefully reviewed this opinion, and still adhere thereto. There was no adjudication in the bankruptcy proceedings as to the avoidance of the lien under 11 USCA, Sec. 107; however, the trustee conveyed the property to the Nolds "free and clear of all claims of lien therein." Also SDCL 1967, 43-25-10, states use of the word "grant" in a conveyance implies the estate is, at the time of the execution of such conveyance, free from all encumbrances done, made, or suffered by the grantor, or any person claiming under him. The deed conveying from the Trustee to the Nolds contained the word "grant". In view of this situation and the reasons stated in my memorandum, it is still my opinion the Nolds can assert as a defense the provisions of 11 USCA, Sec. 107.

Consequently, the issues before the Court are:

1. Was the bankrupt insolvent at the date of the creation of the lien?

2. Was the lien acquired within four months of the filing of the petition in bankruptcy?

As to the first question, I have very carefully considered the proof submitted regarding the insolvency of Mr. Vetos at the time the lien was created. Objection was made to many of the questions, some of which were objectionable. Nevertheless, I believe there was enough competent evidence submitted establishing the bankrupt was insolvent when the lien was created. In this connection, I have considered that very shortly after the lien was acquired, Mr. Vetos was adjudged a bankrupt. Such an adjudication made shortly after the lien was acquired is convincing evidence that he was insolvent when the lien was acquired.

As to the second question, the record shows the attachment was made on May 4, 1967, and the petition for voluntary bankruptcy filed June 8, 1967. Consequently, the lien was acquired within four months of the filing of the petition in bankruptcy.

In conclusion, I will state consideration was given to the claims of laches, caveat emptor, etc., which, in my opinion, are without merit.

The Court will enter a decision in favor of the Nolds, and Mr. Spencer may prepare the appropriate findings of fact and conclusions of law and judgment, which shall be submitted in accordance with the rules of civil procedure.

Yours very truly,

/s/ GEORGE W. WUEST
Circuit Judge

GWW/cm

STATE OF SOUTH DAKOTA
COUNTY OF LAKE, SS.

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

GEO. A. CLARK & SON, INC., a corporation,
Plaintiff,

vs.

F. W. NOLD and HELEN A. NOLD,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter coming on regularly for hearing before the Honorable George W. Wuest, one of the Circuit Judges in and for the Fourth Judicial Circuit, State of South Dakota, on the 23rd day of October, 1969, at 10:00 o'clock A.M. of said day in the Circuit courtroom in the courthouse in the City of Madison, Lake County, South Dakota, Plaintiff appearing by and through its attorney, Dennis Maloney of the firm of Maloney, Kolker & Kolker of Aberdeen, South Dakota, and M. L. Culhane of the firm of Culhane & Culhane of Minneapolis, Minnesota, and Defendants appearing in person and by their attorney, Robert R. Spencer of the firm of Ericsson, Spencer & Blair and the Court having heard the evidence and the witnesses and the proof offered and adduced, and the parties having submitted Briefs to the Court and opposing counsel and the Court having rendered its Memorandum decision and the Court having directed the Defendant to prepare Findings of Fact and Conclusions of Law and Judgment in conformity to the Court's Memorandum Decision in this case, and the Court does hereby make, enter and file its Findings of Fact and Conclusions of Law constituting its record decision in such action:

FINDINGS OF FACT

1.

Plaintiff instituted this action against the Defendants on the 12th day of June, 1968, for the purpose of determining the relative interests and priorities of the Plaintiff and the Defendants in and to certain real estate in the County of Lake, State of South Dakota, described as

> Lots Nineteen (19) and Twenty (20) in Block One (1) of Town Proprietor's Second Addition to the City of Madison, Lake County, South Dakota,

and that due service was had upon the Defendants herein and that an appropriate answer was filed herein and that the issues were properly brought before this Court giving the Court jurisdiction over the parties and the subject matter of this action.

2.

Prior to May 8, 1967, one, Stanley Vetos, formerly of Madison, Lake County, South Dakota, now of Janesville, Rock County, State of Wisconsin, claimed an interest in and ownership to the property described as Lots Nineteen (19) and Twenty (20) in Block One (1), Town Proprietor's Second Addition to the City of Madison, Lake County, South Dakota.

3.

On or about the 4th day of May, 1967, Plaintiff in this action commenced an Attachment Proceedings against Stanley Vetos by attaching the real property described herein, and notice of levy pursuant to said attachment proceeding was duly filed in the office of the Register of Deeds, Lake County, South Dakota, on the 8th day of May, 1967, and recorded in Book 187, page 97.

4.

Stanley Vetos did, on June 8, 1967, file a Voluntary Peti-

tion in Bankruptcy in the United States District Court for the Western District of Wisconsin, Case No. 67 BK 394 and was adjudicated bankrupt.

5.

On the 8th day of September, 1967, Lawrence W. Rice, as Trustee in Bankruptcy of the Estate of Stanley Vetos, bankrupt, by Trustee's Deed, sold Lots Nineteen (19) and Twenty (20) in Block One (1) of Town Proprietor's Second Addition to the City of Madison, Lake County, South Dakota, to the Defendants, F. W. Nold and Helen A. Nold, for the sum of Seventeen Thousand Two Hundred Fifty and no/100 ($17,250.00) Dollars.

6.

The bankrupt, Stanley Orville Vetos, was insolvent on the date the Plaintiff herein filed its Attachment Lien in the office of the Register of Deeds, Lake County, South Dakota, on May 8, 1967, and remained insolvent up to the time his Petition in Bankruptcy was filed.

7.

Plaintiff's Attachment Lien which was filed against Lots Nineteen (19) and Twenty (20) in Block One (1) of Town Proprietor's Second Addition to the City of Madison, Lake County, South Dakota, was acquired within four (4) months of the filing of the Petition in Bankruptcy by Stanley Orville Vetos as aforesaid.

8.

There has never been any adjudication in any Court of competent jurisdiction as to the avoidance of the Plaintiff's Attachment Lien under the provisions of 11 U.S.C.A. §107.

9.

Defendants, F. W. Nold and Helen A. Nold, are proper parties to assert as a defense in this action the provisions of 11 U.S.C.A. §107.

10.

The Circuit Court of Lake County, South Dakota, did, on the 27th day of February, 1968, enter its Judgment in favor of the Plaintiff and against the Defendants in an action entitled Geo. A. Clark & Sons, Inc., Plaintiff, vs. Stanley Vetos, Defendant, Civ. 67-189, wherein and whereby the Court, among other things, adjudged that Geo. A. Clark & Son, Inc. having a lien against Lots Nineteen (19) and Twenty (20) in Block One (1) of Town Proprietor's Second Addition to the City of Madison, Lake County, South Dakota, in the sum of Six Thousand Seven Hundred Fifty-Eight and 39/100 ($6,758.39) Dollars and directed that execution could be resorted to by Plaintiff to foreclose its lien against the above described real estate; said Judgment filed on February 28, 1968, in the Clerk of Courts office, Lake County, South Dakota.

CONCLUSIONS OF LAW

1.

The Court has jurisdiction over the parties and subject matter of the action.

2.

The Plaintiff's Complaint should be dismissed on its merits.

3.

The Attachment Lien or Notice of Levy filed in the office of the Register of Deeds, Lake County, South Dakota on May 8, 1967, and recorded in Book 187 on page 97 against the real estate described as Lots Nineteen (19) and Twenty (20) in Block One (1) Town Proprietor's Second Addition to Madison, Lake County, South Dakota, in an action in Circuit Court entitled Geo. A. Clark & Son, Inc., Plaintiff, vs. Stanley Vetos, Defendant, is of no force and effect as a lien

against the above described real estate and should be discharged and held for naught.

4.

The Judgment of the Circuit Court of Lake County, South Dakota, in an action entitled Geo. A. Clark & Son, Inc., Plaintiff, vs. Stanley Vetos, Defendant, Civ. 67-189, dated February 27, 1968, filed February 28, 1968, insofar as said Judgment places a Lien on Lots Nineteen (19) and Twenty (20) in Block One (1) of Town Proprietor's Second Addition to the City of Madison, Lake County, South Dakota, is of no force and effect and should be discharged and held for naught under and by virtue of the provisions of 11 U.S.C.A. §107.

Let Judgment be entered accordingly.

Dated this 2nd day of February, 1970.

By the Court:

GEORGE W. WUEST
Judge of the Circuit Court

Attest:

Filed March 3, 1970.
ROYCE J. OLSON
Clerk of Courts
(Seal)

STATE OF SOUTH DAKOTA
COUNTY OF LAKE, SS.

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

GEO. A. CLARK & SON, INC., a corporation,
Plaintiff,

vs.

F. W. NOLD and HELEN A. NOLD,
Defendants.

JUDGMENT

The above entitled matter coming on regularly for hearing before the Court on the 23rd day of October, 1969, in the Circuit Courtroom in the Courthouse in the City of Madison, Lake County, South Dakota, Plaintiff appearing by and through his attorneys, Dennis Maloney, of the firm of Maloney, Kolker & Kolker, Aberdeen, South Dakota, and M. L. Culhane, of the firm of Culhane & Culhane, Minneapolis, Minnesota; and Defendants appearing in person and by and through their attorney, Robert R. Spencer, of the firm of Ericsson, Spencer & Blair, and the Court having considered the evidence and the proof adduced and all briefs submitted in support of the respective positions of the parties and having heretofore rendered its Memorandum Decision and made, entered and filed its written Findings of Fact and Conclusions of Law, constituting its decision in said action, and being otherwise duly advised in the premises, it is hereby:

ORDERED, ADJUDGED and DECREED that Plaintiff's Complaint be, and hereby is, dismissed on its merits.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Attachment Lien filed in the office of the Register of Deeds, Lake County, South Dakota, on May 8, 1967, and recorded in

Book 187 on page 97 in an action between Geo. A. Clark & Son, Inc., Plaintiff, vs. Stanley Vetos, Defendant, against Lots Nineteen (19) and Twenty (20) in Block One (1) of Town Proprietor's Second Addition to the City of Madison, Lake County, South Dakota, is hereby declared to be of no force and effect as a Lien against the above described real estate and is hereby discharged and held for naught.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Judge of the Circuit Court of Lake County, South Dakota, in an action entitled Geo. A. Clark & Son, Inc., Plaintiff vs. Stanley Vetos, Defendant, Civ. 67-189, dated February 27, 1968, filed February 28, 1968, insofar as said Judgment is a lien on Lots Nineteen (19) and Twenty (20) in Block One (1) of Town Proprietor's Second Addition to the City of Madison, Lake County, South Dakota, is hereby declared to be of no force and effect as a Lien against the above described real estate and is hereby discharged and held for naught.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Defendants recover of the Plaintiff their costs and disbursements in this action in the amount of _____ Dollars to be taxed by the Clerk as provided by law.

Dated this 2nd day of February, 1970.

By the Court:

GEORGE W. WUEST
Judge of the Circuit Court

ATTEST:

Filed March 3, 1970.
ROYCE J. OLSON
Clerk of Courts
(SEAL)

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Geo. A. Clark & Son, Inc., a Corporation,
Plaintiff-Appellant,

vs.

F. W. Nold and Helen A. Nold,
Defendants-Respondents.

Appeal from the Circuit Court of Lake County,
South Dakota

Hon. George W. Wuest, Judge

Opinion Filed April 13, 1971.

Maloney, Kolker & Kolker, Aberdeen, South Dakota; Culhane & Culhane, Minneapolis, Minnesota, Attorneys for plaintiff-appellant.

Ericsson, Spencer & Blair, Madison, South Dakota, Attorneys for defendants-respondents.

RENTTO, Presiding Judge.

Plaintiff, a creditor of the bankrupt former owner of the real estate involved, claiming a lien thereon instituted this action against the defendants who purchased it from the trustee in bankruptcy, to have determined their respective

interest in it. The judgment of the trial court held plaintiff's claim of lien to be of no force and effect and discharged it. From this determination it appeals.

In 1957 Stanley O. Vetos became the owner of the property which consists of two improved residential lots in Madison, Lake County, South Dakota. On May 5, 1967 Geo. A. Clark & Son Inc., plaintiff herein, started an action in Lake County on a promissory note against Vetos, who was then not a resident of this state, but a resident of Wisconsin. In connection therewith it had issued a writ of attachment and on May 8th it caused these two lots to be attached. On February 27, 1968 judgment for it was entered on the note for $6,758.39. Neither the bankrupt nor the trustee appeared in that action.

On June 8, 1967 Vetos filed a voluntary petition in bankruptcy in Wisconsin and was adjudicated a bankrupt. On September 8th the trustee in bankruptcy, pursuant to an order of the referee, sold at private sale the lots in question to F. W. Nold and Helen A. Nold for $17,250. The deed conveyed them free of all claims of lien, but apparently because of the manner in which the sale proceeding was had this provision was beyond his authority. The lots had been appraised in the bankruptcy at $20,032. Of the purchase price received by the trustee $15,730.40 was paid to the Madison Building & Loan Association in payment of a prior mortgage on the property held by it and certain expenses it had incurred as mortgagee. The balance was retained by the trustee as an asset of the bankrupt estate.

While the Nolds have asserted several defenses as to the claimed attachment lien of the appellant, they rely principally on the proposition that since it was obtained within four months before the filing of Vetos' petition in bankruptcy it is null and void under the provisions of the Feder-

al Bankruptcy Law. Concerning this, appellant argues that only the trustee may assert such invalidity. The Nolds' earlier ground of defense that the property was sold to them free and clear of liens appears to have been abandoned.

Basic to our problem is the provision of the bankruptcy law now codified as 11 U.S.C.A. § 107. It provides in part as follows:

> "(a) (1) Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this title by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this title: *Provided, however,* That if such person is not finally adjudged a bankrupt in any proceeding under this title and if no arrangement or plan is proposed and confirmed, such lien shall be deemed reinstated with the same effect as if it had not been nullified and voided."

This provision of § 107 was formerly a portion of § 67(f) of the Bankruptcy Act of 1898.

While it was thought by some that the adjudication operated automatically to nullify the proscribed liens, that view no longer prevails. The contrary is logically compelled when it is recognized that issue of the fact must be resolved before it can be said that a lien under this section is void. Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426, 44 S.Ct. 396, 68 L.Ed. 770. Among these are the questions as to whether the bankrupt was insolvent when the lien was created and whether it was one of the type of liens listed in the statute and was acquired within four months of the filing of the petition. Collier on Bankruptcy, 14th Ed., § 67.05. In other words, they are only voidable.

The purpose of this section is to prevent one creditor be-

ing preferred over the others or obtaining an advantage. 8A C.J.S. Bankruptcy § 245 a.(1); 9 Am.Jur.2d, Bankruptcy, § 1031. It does not avoid liens as against all the world, but only as against the trustee and those claiming under him. 8A C.J.S. Bankruptcy § 245 b.; 9 Am.Jur.2d, Bankruptcy, § 1042. So long as the property subject to the claimed lien is in the bankrupt estate the trustee is the proper person to either preserve the lien for the benefit of the estate or avoid it. As to property set aside as exempt it is for the bankrupt to avoid the lien. Roquemore v. Goldstein, 100 Ga.App. 591, 112 S.E.2d 24. The lots in controversy were not claimed by him as exempt property.

It seems to us that where the property was sold by the trustee, as was done here, that the purchaser has standing to seek avoidance of liens falling within the proscription of § 107(a)(1). He is a party claiming under the trustee. Finney v. Knapp Co., 145 Ga. 400, 89 S.E. 413; Fischer v. Pauline Oil & Gas Co., 309 U.S. 294, 60 S.Ct. 535, 84 L.Ed. 764; same case on remand, 191 Okl. 346, 130 P.2d 305; Branch v. Human, 215 Ga. 209, 109 S.E.2d 732; 8A C.J.S. Bankruptcy § 245 (4)b. To hold otherwise in the circumstances of this case would be inequitable and in effect prefer the appellant as a creditor of the bankrupt. Since the validity of the lien was not determined by the bankruptcy court, it may properly be done in this action. Remington on Bankruptcy, Vol. 4 (Henderson), § 1618.5.

In commenting on a group of cases in another regard, Mr. Justice Roberts speaking for the court in the Fischer case said: "In none of these instances, however, was the litigation between third parties, or *between the lienor* or one claiming title under an execution sale, *and an opponent deriving title from the trustee in bankruptcy*". And concerning the fact issues on which the avoidance depends it is there-

in written that: "as between the trustee, *or one claiming under him, and the lienor,* or one claiming by virtue of the lien, the parties are entitled to have (the issues) determined judicially." Our holding is in harmony with these expressions. We have inserted the emphasis in the quoted statements to illustrate their application to this case.

While the cases cited and relied on by the appellant contain academic statements supporting its position, they are factually distinguishable from this case. None of them involved a purchaser of property for value from the trustee. In this connection it is proper to observe that the attempt of the trustee to be permitted to intervene in this action and seek avoidance of the attachment lien on the grounds that it was void under § 107 was resisted by appellant and denied by the court. This seems inconsistent with its present position.

It is not disputed that the attachment lien with which we are concerned was filed on May 8, 1967 nor that the Vetos' petition in bankruptcy was filed on June 8, 1967. It seems agreed by the parties that the lien was of the kind proscribed and was obtained within four months before the filing of the petition. In addition the court found that Vetos was insolvent when the lien was obtained and remained so up to the filing of his petition. This finding appellant attacks claiming that there is no competent evidence to support it.

To establish the bankrupt's insolvency the defendants introduced his testimony which had been taken by deposition. At its taking appellant appeared and objected to questions asked him concerning the various properties that he owned during the time in question and their values, on the ground that they were leading and suggestive. It seems to us that appellant misconceives the condemnation of this rule. Ques-

tions may legitimately suggest to the witness the topic of the answer. They become improper only when they suggest the specific answer desired. This is basically a matter of degree. Wigmore on Evidence, 3rd Ed., § 769; McCormick on Evidence, § 6. The application of a rule as flexible as this must of necessity be largely committed to the discretion of the trial judge. We discern no abuse of that discretion in the rulings complained of.

In testifying as to the value of his properties and the extent of his debts the bankrupt utilized a copy of the schedules of these that he had filed in the bankruptcy proceeding. They were not put in evidence. Appellant's objection to this testimony on the ground that it was not the best evidence was overruled. We think this ruling proper. In 29 Am.Jur. 2d, Evidence, § 449, the rule is stated thus:

> "The best evidence rule has no application to a case where a party seeks to prove a fact which has existence independently of any writing; he may so do by oral testimony, even though the fact has been reduced to, or is evidenced by, a writing."

The challenged evidence was not offered to prove the contents of a document. Rather the document was used to refresh the witnesses' recollection. Olson v. Aldren, 84 S.D. 292, 170 N.W.2d 891; Wigmore on Evidence, 3rd Ed., §§ 758 and 759. This practice is permissible as reviving a present recollection.

As the owner of the property he was qualified to testify as to its value, Hannahs v. Noah, 83 S.D. 296, 158 N.W.2d 678, and in doing so he did not have to possess the qualification of an expert as suggested by appellant. Manifestly, he was competent also to testify as to his indebtedness. Of course his testimony in both areas was subject to contradiction but none was offered.

Since he did not appear before the court when testifying

we have reviewed his testimony as though presented here in the first instance. Consequently, the clearly erroneous rule of SDCL 15-6-52(a) does not apply. In other words, it is not burdened with a presumption in favor of the trial court's determination. State Automobile Casualty Underwriters v. Ruotsalainen, 81 S.D. 472, 136 N.W.2d 884. We have so viewed it and are satisfied that the questioned finding has ample evidentiary support. The thrust of his testimony was that his insolvency continued from May 1, 1967, to June 8, 1967. Incidentally, copies of papers from bankruptcy proceedings included in the settled record reveal that the bankrupt had debts of $42,286 and assets valued at $7,150 when the lien was obtained.

We have considered the other propositions urged by the appellant. In our opinion they are groundless and do not merit discussion. Accordingly, the judgment appealed from is affirmed.

Hanson and Biegelmeier and Winans, JJ., concur.

Wollman, Judge, dissents.

Wollman, Judge (dissenting).

I cannot agree that respondents as purchasers at a bankruptcy sale have standing to avoid appellant's lien under the provisions of 11 U.S.C.A. § 107. The authorities cited in the majority opinion seem to me to compel the conclusion that only the trustee in bankruptcy may assert invalidity of liens under the provisions of § 107.

As the majority opinion states, the purpose of § 107 is to prevent one creditor from being preferred over other creditors of a bankrupt. This being the case, I can see no reason why a purchaser at any bankruptcy sale should be permitted to invalidate liens under the provisions of § 107 inasmuch as he comes upon the scene after the adjudication of bankruptcy and therefore does not share the unhappy fate of

creditors who have learned to their sorrow that they walked too long with the bankrupt. This is especially true where, as in the instant case, the purchaser had notice of the lien at the time he purchased at the bankruptcy sale.

The decision in Fischer v. Pauline Oil & Gas Co., 309 U.S. 294, 60 S.Ct. 535, 84 L.Ed. 764, declared that the predecessor of § 107 was not self-executing; it did not, in my opinion, hold that a purchaser at a bankruptcy sale is entitled to invalidate a lien for his own benefit. The case of Finney v. Knapp Co., 145 Ga. 400, 89 S.E. 413, was decided prior to the Fischer case and was premised on the assumption that the law in question was self-executing and that it automatically voided liens such as the one here involved. Moreover, in Finney the property had been ordered sold free and clear of all liens and encumbrances. Also, it appears that the case was in effect overruled by Morris Plan Bank v. Simmons, 201 Ga. 157, 39 S.E.2d 166, where the Georgia Supreme Court held that a garnishee defendant could not assert the defense of § 107 because:

> "* * * the petition * * * seeking to set aside the default judgment against themselves as garnishees, does not purport to serve any purpose recognized by the bankruptcy act, and the plaintiffs do not show any right to invoke its provisions. They are debtors rather than creditors of the bankrupt, and would therefore have no interest whatever in avoiding the lien for the benefit of such creditors. Nor are we concerned here with any right of the bankrupt, for it does not appear that the debt owed to him by garnishees was set apart to him as an exemption. Furthermore, he is not complaining."

See also Branch v. Human, 215 Ga. 209, 109 S.E.2d 732. So also in the instant case respondents are not purporting to set aside the appellant's lien to serve any purpose recognized by the bankruptcy act.

In Kruger v. Harber Realty Corp., 11 N.J. Super. 552, 78

A.2d 621, a person claiming an ownership interest through a conveyance from a trustee in bankruptcy was not permitted to assert the invalidity of a prior lien under the provisions of § 107. See also Grimbilas v. Linfair, Inc., 126 N.J.L. 82, 18 A.2d 412, and Kobrin v. Drazin, 97 N.J. Eq. 400, 128 A. 796.

We are told that it would be inequitable to hold in the circumstances of this case that respondents may not assert the provisions of § 107, but we are not given any reasons why it would be inequitable to so hold. The fact that such a holding would have the effect of preferring appellant as a creditor of the bankrupt should not be of any legitimate concern to respondents as purchasers. Respondents do not claim that they are attempting to vindicate the rights of other creditors of the bankrupt. Indeed, it does not appear that they could validly make such a claim.

Respondents saw fit to purchase the property in question at a time when they were on notice of appellant's attachment lien. I cannot believe that the purpose of § 107 is to give strangers to the bankrupt and his creditors the right to invalidate an otherwise valid lien when neither the trustee nor any creditor has seen fit to take such action.